COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS & BUSINESS REGULATION
DIVISION OF ENERGY RESOURCES

RENEWABLE ENERGY PORTFOLIO STANDARD

POLICY STATEMENT
on the
RPS Eligibility of Retooled Biomass Plants

October 27, 2005

Introduction and Summary

On July 1, 2005, the Division of Energy Resources ("DOER") issued jointly with the Department of Environmental Protection ("DEP") a *Notice of Inquiry Regarding Some Proposed Revisions of the [RPS[1]] Regulations Pertaining to the Definition of "Low-Emission, Advanced Biomass Power Conversion Technologies"* ("NOI"). The NOI initiated an Inquiry in which stakeholders submitted more than fifty written comments and also participated in a conference focused on that definition and some related matters.[2] DOER received comments from a wide range of stakeholders: owners and developers of biomass power plants (existing, new, and potential), biomass technology vendors, wind power owners and developers, clean energy and consumer advocacy groups, utility companies, and some interested citizens.

The final page of the NOI stated that DOER and DEP would issue a "Policy Statement informing the public of the results of the review and a decision to move forward with specific regulatory revisions through a formal Rulemaking." DOER today provides this Policy Statement on one major issue discussed in the Inquiry:

> Whether, and to what extent, a technically ineligible biomass unit with a commercial operation date prior to 1/1/98 that is retooled thereafter to meet the RPS criteria of "low-emission, advanced biomass power conversion technologies" will qualify as a "New Renewable Generation Unit."[3]

The purpose of this Statement is to provide to the RPS marketplace a clear indication of DOER's interpretation of applicable law and its resulting policy position. In so doing, DOER intends to

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[1] The regulations for the Renewable Energy Portfolio Standard ("RPS"), 225 CMR 14.00 et seq, can be accessed on line at http://www.mass.gov/doer/rps/225cmr.pdf. The statutory basis for RPS, M.G.L. Chapter 25A, Section 11F, can be accessed at http://www.mass.gov/legis/laws/mgl/25a-11f.htm.

[2] See http://www.mass.gov/doer/rps/notice_of_inquiry.htm.

[3] This Policy Statement modifies DOER's initial proposal on this issue, as described at item 3 on page 13 of the NOI.

provide greater regulatory certainty regarding the treatment of biomass fueled power plants under the Massachusetts RPS.

Vintage Waiver for Retooled Facilities Is Now Required

After review of comments provided during the Inquiry, of applicable law, and of its experience over the last two years with the practical consequences of its previous policy position, DOER has determined that its policy on "retooling" of pre-1998 biomass plants should be revised to make clear that the energy output of such a plant up to the amount of its annual historic output shall not be RPS-eligible generation. Consequently, the agency's "Guideline on the MA RPS Eligibility of Generation Units That Re-tool with Low Emission, Advanced Biomass Power Conversion Technologies" ("Biomass Retooling Guideline")[4] is hereby withdrawn and declared null and void, effective as of the date of this Policy Statement. In its forthcoming revision of the RPS regulations, DOER will make clear that such a retooled plant may qualify under a Vintage Waiver, by which only the energy output in excess of its Historical Generation Rate[5] would qualify as New Renewable Generation and earn RPS-qualified renewable energy credits ("RECs"). Later in this Policy Statement DOER describes how it will deal with those Statements of Qualification and Advisory Rulings that have been requested, and in some cases issued, since the adoption of the Biomass Retooling Guideline.

Basis for this Decision

In the Biomass Retooling Guideline, DOER stated that a previously ineligible, pre-1998 biomass power plant that undergoes an appropriate retooling after 1997 could qualify as a New Renewable Generation Unit without recourse to a Vintage Waiver.[6]

The Guideline concluded that such a previously ineligible biomass power plant should be regarded as a "new renewable energy generating source" not subject to a Vintage Waiver because the statute did not regard it as "renewable" prior to its retooling. By this logic, DOER stated that such a retooled generating source is treated in the statute no differently than other non-renewable generating sources (such as coal or oil fired generating plants) similarly retooled and converted to RPS-eligible biomass fuels: it would be eligible to receive RECs for every MWh of energy produced.

DOER has concluded, both from its own internal review and from its review of the NOI Comments, that the clear intent of M.G.L. c. 25A, sec. 11F is to stimulate development of "new" renewable energy generating sources with intended benefits including fuel diversity and price

[4] The Biomass Retooling Guideline can be accessed at http://www.mass.gov/doer/rps/advbio.htm.

[5] "Historical Generation Rate" is defined in the RPS regulations at 225 CMR 14.02 as "The average annual electrical production from a Generation Unit . . . for the three calendar years 1995 through 1997, or for the first 36 months after the Commercial Operation Date if that date is after December 31, 1994."

[6] See the RPS regulations at 225 CMR 14.05(2).

stability, as well as environmental and economic benefits.[7] An obvious consequence of the Biomass Retooling Guideline is that the same facility (with some retrofitted equipment) would consume the same amount of renewable fuel before and after 1/1/98 to produce the same amount of power: thus, it would contribute no additional renewable electricity to the grid. DOER agrees with the observation made by Ridgewood Renewable Power:

> . . . while [the application of the Guideline] may increase the amount of eligible renewable generation, it does not increase at all the renewable generation in the NEPOOL region.[8] [emphasis added]

Thus, the practical consequence of the Guideline is at odds with a common sense application of the language and intent of the statute.

DOER also agrees with the Town of Hull Municipal Lighting Plant that the words "new" and "additional," as they appear in Section 11F,

> . . . must be read, by the plain meaning ascribed to the words, to require that only new sources be utilized to meet the minimum RPS standard prescribed by the statute. And new renewable energy sources are only those with commercial operation dates after December 31, 1997 . . . unless such plant qualifies under a Vintage waiver.[9]

The statute's use of the word "new" in the phrase "new renewable energy generating source" and its use elsewhere of the phrase "renewable energy generating source" without the word "new" as a modifier signify that the legislature placed great importance on the distinction accomplished by that modifier. Indeed, it is quite clear that the list of fuels considered "renewable" under the statute includes biomass fuel. The critical distinction in correctly interpreting and applying the provisions of Section 11F of the statute, however, is whether a plant that uses biomass fuel is "new" or not. That section makes it clear that a "new renewable energy generating source" is "one that begins commercial operation after December 31, 1997, or that represents an increase in generating capacity after December 31, 1997, at an existing facility."[10] Thus, an appropriately retrofitted, pre-1998 biomass plant can be considered "renewable" but not "new."

The statute contemplates the retrofitting of biomass plants with "advanced conversion technologies." In the Biomass Retooling Guideline, DOER assumed that such action would qualify the plant as "new" since it had not previously been qualified as "renewable." However, it has become evident that this interpretation is at odds with a common sense reading of the statute. As CLF pointed out in its comments on the NOI,

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[7] See July 25, 2005 comments of Conservation Law Foundation (CLF) at page 2, and Union of Concerned Scientists (UCS) at p. 2-3. These comments can be accessed via a link at http://www.mass.gov/doer/rps/comments.htm.

[8] August 18, 2005 comments of Ridgewood Renewable Power at p. 5, which may be accessed via a link at http://www.mass.gov/doer/rps/addcomments.htm.

[9] August 15, 2005 comments of Town of Hull Municipal Lighting Plant at p.2, which can be accessed via a link at http://www.mass.gov/doer/rps/addcomments.htm.

[10] The last clause in this statutory language (beginning with ". . . or that represents an increase . . .") is the basis for the Vintage Waiver provision in the RPS regulations at 225 CMR 14.05(2).

> . . . the statute notably contemplates the idea of retrofitting previously operational biomass facilities, and establishes that such a retrofitted facility may be considered a 'renewable energy generating source.' Here the law notably distinguishes between 'new' renewable generating facilities – which must be relied upon for the requisite minimum percentage of kilowatt-hours sales to end-use customers – and those that are retrofit and not considered 'new'.[11]

Since the issuance of the Biomass Retooling Guideline, DOER has seen a number of existing biomass plants seek eligibility as "new" through retooling and, thereby, qualification to sell RECs for all of the electrical energy produced. The cost for such retooling (largely with combustion improvement and pollution control equipment) is considerably less than for the construction of an entirely new facility. Thus far, only one pre-1998 biomass facility has received a Statement of Qualification based on the Guideline.[12] However, DOER projects that potential exists for over 750 MWs of pre-1998 biomass plants to retool. DOER believes, based in part on recent events in the Connecticut RPS market,[13] that an influx of RECs from these plants would severely damage the REC market in Massachusetts and adversely affect the goal of the RPS program to promote the development of "new" renewable energy generating facilities.

Continued application of the Biomass Retooling Guideline would drastically increase the amount of available REC-eligible generation and RECs in the market. In the face of such a large potential supply of RECs from existing plants, and the drop in REC prices likely to follow, developers of genuinely "new" renewable generation units would be unlikely to proceed to make the investments necessary to construct those new plants. The risk of dramatically reduced REC prices, potentially well below the long-term marginal cost considered necessary to stimulate new renewable energy development, is likely to undermine the financial projections on which new development relies to obtain construction financing.

DOER's Revised Statement of Policy:

DOER now finds that the application of the April 2004 Guideline is contrary to proper statutory construction and interpretation of legislative intent.

DOER finds that, with respect to retooling of biomass plants, the statute is properly applied only by reading the two separate provisions found within M.G.L. c. 25A, sec. 11F (a) and (b) as a coherent whole. Such a reading provides that any pre-1998 biomass facility retrofitted with low-emission, advanced power conversion technologies may only be qualified to produce RECs under a Vintage Waiver for its "new" renewable energy generation, which represents an increase over its Historical Generation Rate.

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[11] July 25, 2005 comments of CLF at p. 2, which may be accessed via http://www.mass.gov/doer/rps/comments.htm.

[12] Greenville Steam Company, Greenville, ME (20 MW capacity)

[13] See "Industry Outlook: Is the Connecticut REC market wrecked?" by Jennifer Zajac, published by SNL Financial, Sept. 12, 2005, describing the collapse of the Connecticut Class I Certificate market last summer (which can be accessed at http://www.snl.com/InteractiveX/article.aspx?CDID=A-2149787-11102).

DOER will henceforth regard such a retooled plant as eligible to produce RECs only under the Vintage Waiver provision of the RPS regulations. This interpretation is more reasonably consistent with the statute.

Finally, DOER finds – from its experience of the past two years and from consideration of likely consequences of an expansive interpretation of the RPS eligibility of retooled biomass plants – that its conclusion that retooled plants are not "new" under the statute will make for sound public policy and will further the evident, basic goal of the RPS statute: to provide a financial incentive for sustained growth in the share of electricity supplied to Massachusetts consumers from new renewable energy resources.

Effect of this Decision on the Proposed Rulemaking

Consistent with this decision, certain provisions proposed in the NOI are no longer under consideration for the upcoming rulemaking and will not be formally proposed as revisions of the RPS regulations. Specifically, DOER will not propose a new section in 225 CMR 14.05, described on page 13 of the NOI as a "Retrofitting with Eligible Biomass Technologies Waiver," which would have formalized in regulation DOER's former position regarding retooled biomass plants.

DOER is considering revising the RPS regulations to include the following clarifications pertaining to retrofitted plants and Vintage Generation:

- Change the definition of a Vintage Unit at 225 CMR 14.02 so that it includes any pre-1998, technically ineligible, biomass Unit that is retooled after 1997 to meet the RPS criteria of "low-emission, advanced biomass power conversion technologies." Thereby, only that portion of the electricity output of such plant that exceeded its Historical Generation Rate would qualify as New Renewable Generation, under the Vintage Waiver provision at 14.05(2).
- Revise the Vintage Waiver provision at 14.05(2) to make it clear that a power plant that formerly used only ineligible fuels – which, in this context, means fossil fuels – would qualify as a New Renewable Generation Unit if it were retooled after 1997 to meet the other requirements of 14.05. Such a unit would not require a Vintage Waiver, and all of its output going forward may be RPS-eligible.

Status of Existing Statements of Qualification, Statement of Qualification Applications, Advisory Rulings, and Advisory Ruling Requests

In the joint NOI, DOER stated the following:

> . . . the outcome of this two-part process will not invalidate any Statement of Qualification or Advisory Ruling issued by DOER prior to the publication of this Notice. Subject to footnote 2 . . . , DOER does not intend to issue any Statements of Qualification or Advisory Rulings with respect to biomass projects prior to promulgation of regulations resulting from the rulemaking anticipated to follow this Inquiry.

Footnote 2 of the NOI listed four Statements of Qualification Applications (SQAs) already received before issuance of the NOI[14] and stated, "DOER reserves the right to issue or deny Statements of Qualification for these [four] projects pursuant to the existing regulations." All four are for proposed projects to retool ineligible, pre-1998 biomass plants.

With regard to Advisory Rulings issued prior to the publication date of the NOI, an additional footnote to the paragraph quoted above stated that they "shall remain valid only with respect to those aspects of each Ruling that reference specific fuels, technologies, and emission limits." DOER reaffirms that statement.

Finally, DOER reaffirms its statement in footnote 3 of the NOI that action on any requests for Advisory Rulings on biomass fueled plants pending as of the date of the NOI will be deferred until the pending rulemaking is completed, and they will be subject to the revised regulations. The same will hold true of any additional requests for Advisory Rulings and SQAs on biomass fueled plants received before promulgation of the revised regulations.[15] An exception may be made in the case of an SQA that DOER finds does not deviate negatively from the fuels, technologies, and air emission limits specified in a prior Advisory Ruling for the project.

DOER and DEP Plans for the Upcoming Rulemaking

Both DOER and DEP appreciate the many thoughtful comments submitted in writing and in face-to-face discussion during the course of the current Inquiry process. The two agencies have reviewed all of the input received from stakeholders, as well as other information. As it concludes the NOI process, DOER intends to initiate the process for amending the RPS regulations. That regulatory revision process will commence formally later this fall.

DOER's proposed revisions to the RPS regulations will include clarification of the criteria that must be met by biomass plants to achieve both the "low-emission" and "advanced power conversion technology" requirements of the statute. DEP's anticipated rulemaking will pertain to matters of air emissions for biomass-fueled power plants in Massachusetts.

[14] The four pending SQAs were for Boralex Fort Fairfield (Maine, 33 MW), Boralex Livermore Falls (Maine, 40 MW), Boralex Stratton Energy (Maine, 50 MW), and Greenville Steam Company (Maine, 20 MW). Of the four, a Statement of Qualification was granted for Greenville Steam Company on July 22, 2005. This is the first retooling project that DOER has qualified under the Biomass Retooling Guideline.

[15] DOER's authority to reinterpret its guidelines and suspend issuance of Advisory Rulings or Statements of Qualification during the pendency of such review is well established by the Supreme Judicial Court. The SJC has long accorded agencies the authority to reinterpret existing regulations, and such reinterpretation is not held to be a rule or regulation subject to the rulemaking provisions of the Massachusetts Administrative Procedure Act (M.G.L. c. 30A). The Court has held that in the absence of clear error, the agency's interpretation and application of its own rule or regulation is entitled to judicial deference. See Grocery Manufacturers of America, Inc. v. Department of Public Health, 379 Mass. 70 (1979); Finkelstein v. Board of Registration in Optometry, 370 Mass. 476 (1976).